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NO. 82-369

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner,

v.

MOBIL OIL CORPORATION, ET AL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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v.

MOBIL OIL CORPORATION, ET AL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Respondent, Mobil Oil Corporation, prays that this Court deny a Writ of Certiorari to issue to review the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas entered in this cause on January 28, 1982.

STATEMENT OF THE CASE

The section of the Petition entitled "Statement of the Case" and the opinion below generally set out what has previously transpired.

SUMMARY OF RESPONDENT'S ARGUMENT IN OPPOSITION TO THIS COURT GRANTING THE WRIT OF CERTIORARI

I.

The Rule of *Liepelt* Does Not Apply in an Outer Continental Shelf Lands Act Case.

a. *Liepelt* does not further the congressional purpose of the Outer Continental Shelf Lands Act as it applies to suits for personal injuries.

b. Traditional considerations for the application of federal common law to a particular situation are not present here.

c. *Liepelt* has not been applied in similar cases.

II.

The Decision of the Court of Civil Appeals Conflicts with Neither this Court's Opinions Nor Opinions of the Fifth Circuit.

a. Because *Liepelt* does not apply to Outer Continental Shelf Lands Act cases as federal common law, it does not conflict with applicable state law.

b. The Fifth Circuit cases cited by Petitioner are readily distinguishable.

III.

Failure to Give the Proposed Instruction was Harmless Error, if Error were Committed.

ARGUMENT

I.

THE RULE OF *LIEPELT* DOES NOT APPLY IN AN OUTER CONTINENTAL SHELF LANDS ACT CASE.

To guide the Texas Court of Civil Appeals on remand, this Court noted "[t]o apply the statutory directive a court must consider the content of both potentially applicable federal and state law." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 (1981). As mandated, the Court of Civil Appeals found that Louisiana law makes the giving of an explanatory instruction to a jury that its award is not subject to income taxes discretionary with the trial court. *Gulf Offshore Co. v. Mobil Oil Corp.*, 628 S.W.2d 171 (Tex. Civ. App.—Houston [14th Dist.] 1982), writ ref'd n.r.e. Although Petitioner suggests that this Court may review that aspect of the lower court's opinion (Petition at p. 7, n.3), Respondent would submit that this Court's jurisdictional grant does not include a determination of the content of state law. *Henry v. Mississippi*, 379 U.S. 443, 446 (1965); *see*, 28 U.S.C. § 1257. Furthermore, Petitioner has not designated a point of error concerning Louisiana law, and it is therefore not subject to review by this Court. Rules of the Supreme Court 21.1(a). The relevant question at this juncture is therefore does the cautionary instruction concerning income taxes promulgated in *Norfolk & Western R.R. Co. v. Liepelt*, 444 U.S. 490 (1980) apply to this case.

By definition, the rule pronounced in *Liepelt* is "federal common law", that being a "law of independent federal judicial decision." *United States v. Standard Oil Co.*, 332

U.S. 301, 308 (1947). Strictly read, *Liepelt* applies only to actions brought under the Federal Employers Liability Act, 45 U.S.C. §§ 51 et seq. This Court stressed in *Liepelt* that "questions concerning the measure of damages in an FELA action are federal in character." 444 U.S. at p. 493. Although the Outer Continental Shelf Lands Act makes any law applied regardless of its source "federal law", the fact that the *Liepelt* rule is federal decisional law does not of itself mean that it applies in this case.

a. The Rule of *Liepelt* Does Not Further the Congressional Purpose of the Outer Continental Shelf Lands Act as it Applies to Suits for Personal Injuries.

The declared congressional purpose of the Outer Continental Shelf Lands Act is to subject the subsoil and seabed of the Shelf to federal control and jurisdiction. 43 U.S.C. § 1332. The Act was passed "solely to regulate the leasing and development . . . of the oil potential of the Continental Shelf." *Continental Oil Co. v. Federal Power Commission*, 370 F.2d 57, 67 (5th Cir. 1966), *cert. denied*, 388 U.S. 910 (1967), citing H.R. Rep. No. 413, 83rd Cong., 1st Sess. 2-3 (1953), 2 U.S. Code Cong. & Ad. News p. 2178 (1953). Congress wanted federal control over these areas and indeed dictated that they would be treated as federal enclaves located within a state. 43 U.S.C. § 1333(a)(1). Congress looked, however, to adjoining state law for the "social laws" necessary for the protection of the workers. This Court has on three occasions taken note of the "special relationship between the men working on these artificial islands and the adjacent shore to which they commute to visit their families."

Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 365 (1969); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 103 (1971); and *Gulf Offshore Co. v. Mobil Oil Corp., supra*, 453 U.S. at p. 484.

The Petitioner argues that this case differs from *Huson* because since federal law on a particular subject, i.e. cautionary instructions regarding taxation of awards, already exists, the court would not be "creating" federal common law but applying existing law. There is, therefore, no gap to be filled by state law. But to apply a relatively new (1980) common law principle to the Outer Continental Shelf where a body of state personal injury law is generally thought applicable is in essence the *creation* of a new federal common law rule for that situation, which is precisely what this Court warned against in *Huson*.[1] Congress specified that a *comprehensive body* of state law should apply. 404 U.S. at p. 104. This Court emphasizes the "substance of the remedy." 404 U.S. at p. 103. Just as a time limitation on suit is part of the substance of the remedy, so is the measure of damages. The damages are state law created, although federally applied, and are therefore not "federal in character," calling for the application of *Liepelt*.

b. The Traditional Considerations for the Application of Federal Common Law to a Particular Situation are not Present Here.

This Court has cited several factors that are important in determining whether a uniform federal common law will apply in specific circumstances. These factors include

1. "Thus, Congress . . . did not intend that federal courts fill those 'gaps' themselves by creating new federal common law." 404 U.S. at pp. 104-105.

a consideration of federal policy, the "groundings of the actions", the legal interest in relations of the federal government, and "a variety of considerations always relevant to the nature of the specific governmental interest and to the effects upon them of applying state law." *United States v. Standard Oil Co., supra,* 332 U.S. at p. 310. The court must be alert to provide remedies necessary to effectuate congressional purpose, but the creation of such remedies should not be done where the remedies sought would not aid the primary congressional goals. *Cort v. Ash,* 422 U.S. 66, 84 (1975). The congressional purpose as related to social legislation dealing with personal injuries is not furthered by uniform federal common law relating to damages. Indeed, the Supreme Court has specifically rejected a need for uniformity in Outer Continental Shelf Lands Act cases in *Huson* by its holding that the statute of limitations for each state applies.[2]

The measure of damages under state law controls in suits brought under the Outer Continental Shelf Lands Act. Indeed, the plaintiff in *Rodrigue* urged that Louisiana law rather than the Death on the High Seas Act was applicable because it provided more elements of damage.

The courts are more likely to invoke a uniform federal common law in cases where the United States is a party to the litigation. *See, e. g., Bank of America National Trust & Savings Ass'n v. Parnell,* 352 U.S. 29, 33-34

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2. A quick example of how the rights of offshore workers differ from state to state involves an examination of three Gulf states' statutes of limitation: a Texas offshore worker would be controlled by a two-year statute of limitations, TEX. REV. CIV. STAT. ANN., ART. 5526; a Louisiana worker would be confronted with a one-year prescription statute, LA. CIV. CODE ANN. ART. 3536; and a Mississippi worker would have the luxury of a six-year statute of limitations, MISS. CODE ANN. § 14-1-49.

(1956). By definition, the United States is a party in cases filed under the Federal Tort Claims Act, which provides for government liability "in the same manner and to the same extent as a private individual under like circumstances . . ." 28 U.S.C. § 2674. The Federal Tort Claims Act assimilates into federal law the rules of substantive laws of the several states with their "notorious divergencies." *Feris v. United States*, 340 U.S. 135, 142 (1950). The court must apply the whole law of the state. *Richards v. United States*, 369 U.S. 1, 11 (1962). The courts have refused to apply *Liepelt* to cases on file against the United States government under the Federal Tort Claims Act: *Erickson v. United States*, 504 F.Supp. 647 (D.S.D. 1980); *Draisma v. United States*, 492 F. Supp. 1317, 1327 (W.D. Mich. 1980).

c. *Liepelt* has Not Been Applied in Similar Cases.

Liepelt has been applied in FELA suits and suits brought under the Jones Act or general maritime law. These situations involve federal causes of action whose damages are federal in character with a long recognized need for uniformity. *Liepelt* has not been applied, however, to cases that are more analogous to personal injuries arising on the Outer Continental Shelf:

1. Diversity Cases: *Croce v. Bromley Corp.*, 623 F.2d 1084 (5th Cir. 1980) *cert. denied*, 450 U.S. 981 (1981); *Fenasci v. Travelers Insurance Co.*, 642 F.2d 986 (5th Cir.) *reh. denied*, 648 F.2d 446 (1981); *Estate of Spinosa v. International Harvester Co.*, 621 F.2d 1154 (1st Cir. 1980); *In Re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 526 F.Supp. 226 (N.D. Ill. 1981); *Gerbich v. Evans*, 525 F.Supp. 817 (D. Col. 1981).

2. Federal Tort Claims Act. *Erickson v. United States, supra; Draisma v. United States, supra.*

3. Federal enclave litigation. Federal legislation provides that when one sustains a personal injury in any national park or other federal enclave within the exterior boundaries of any state, the rights of the parties shall be governed by the laws of the surrounding state. 16 U.S.C. § 457. This presents an identical situation to suits for personal injuries arising on the Outer Continental Shelf. The only case to consider whether *Liepelt* applies in this federal enclave litigation has affirmed the trial court's refusal to permit evidence of the effect of income tax or instruct the jury regarding the non-taxability of a damage award per state law. *Vasina v. Grumman Corp.*, 644 F.2d 112, 118 (2d Cir. 1981).

II.

THE DECISION OF THE TEXAS COURT OF CIVIL APPEALS CONFLICTS WITH NEITHER THIS COURT'S OPINIONS NOR THE OPINIONS OF THE FIFTH CIRCUIT.

a. Because *Liepelt* Does Not Apply to Outer Continental Shelf Lands Act Cases as Federal Common Law, it does not Conflict with Applicable State Law.

As explained, *supra*, *Liepelt* does not apply either by its own terms or by utilizing appropriate common law analysis to cases arising on the Outer Continental Shelf. The applicable state law makes a *Liepelt* instruction discretionary with the trial court. There is therefore no conflict with opinions of this Court.

b. The Fifth Circuit Cases Cited by Petitioner are Distinguishable.

Petitioner cites two Fifth Circuit cases that are allegedly in conflict with the decision of the Texas Court of Civil Appeals. In *Berry v. Sladco, Inc.*, 495 F.2d 523 (5th Cir. 1974), the Fifth Circuit considered when interest should accrue on a judgment for personal injuries. Under Louisiana law, interest accrues from the time of judicial demand. A federal statute, however, 28 U.S.C. § 1961, provides that interest shall be calculated from the date of the entry of judgment. The court decided that the federal *statute* was applicable and mandatory and therefore prevailed because it was inconsistent with Louisiana law.

In *Continental Oil Co. v. London Steam-Ship Owners Mutual Insurance Ass'n, Ltd.*, 417 F.2d 1030 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970), a vessel collided with an artificial island on the Outer Continental Shelf. The court held that the suit by the platform owner against the vessel was "clearly a maritime claim under the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740." 417 F.2d at p. 1032. There was thus federal law made applicable to the situation by statute.

III.

THE TRIAL COURT'S REFUSAL TO SUBMIT A CAUTIONARY INSTRUCTION REGARDING TAXATION OF DAMAGE AWARDS WAS HARMLESS ERROR, IF ERROR WERE COMMITTED.

In its previous opinion, this Court gave the Texas Court of Civil Appeals the opportunity to consider wheth-

er the trial court's failure to give the cautionary *Liepelt*-like instruction was harmless error. The state court did not have to decide that point. The harmless error rule applies both in Texas state (TEX. R. CIV. PROC. 434) and federal litigation (28 U.S.C. § 2111). The burden of proof to show harmful error is on the petitioner. *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943). For a court to find the error in failing to give a cautionary instruction reversible "there ought to be evidence either that juries in general increase recoveries on this account or that particular jury did." *McWeeney v. New York, N.H. & Hartford R.R.*, 282 F.2d 34, 39 (2d Cir. 1960). The Petitioner must show that the jury did, in fact, operate under a false impression of the tax laws. *Raycraft v. Duluth, Missabe & Iron Range Railway*, 472 F.2d 27 (8th Cir. 1973). Jury instructions are subject to the harmless error rule and the appellant has the burden to establish the prejudicial effect of the trial court's refusal to give the requested instruction. *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880 (8th Cir. 1980).

Petitioner has never contended that the verdict was excessive. Indeed, the jury award of $900,000 is less than the plaintiff's evidence on lost wages alone, without taking into consideration any recovery for pain and suffering.[3]

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3. The evidence established that Plaintiff had a life expectancy of 41.8 years, and work life expectancy of 32 years at the time of trial (Statement of Facts p. 323). Plaintiff was being compensated at the rate of $4.04 per hour, with time and a half for overtime, working in excess of 12 hours per day, 7 days a week. (Statement of Facts pp. 191-193). Plaintiff also received free room and board while on the rig. (Statement of Facts p. 68). The Plaintiff's attorneys submitted to the jury that Plaintiff's wages and benefits amounted to $16,910.40 per year (Jury Argument p. 14) and testimony was received that the wages increased at a rate of 10 percent annually. (Statement of Facts p. 192). A 5 percent increase in income over

CONCLUSION

For the foregoing reasons, Respondent, Mobil Oil Corporation, would respectfully submit that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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the Plaintiff's work life expectancy rather than 10 percent argued by Plaintiff, yields an anticipated gross income of $1,856,000 and after deducting the Plaintiff's anticipated earnings over his work life expectancy, the jury would still be left with the figure of approximately $1,500,000. After applying a discount rate of six percent, which was argued by the Plaintiff's counsel without objection from Petitioner, the jury would be left with an after tax income in excess of $1,000,000. The Plaintiff furthermore argued without objection that he had sustained $63,500 in accrued lost wages.

CERTIFICATE OF SERVICE

I, FRANK CATON, a member of the Bar of this Court and counsel for Mobil Oil, hereby certify that:

1. All parties required to be served in this proceeding have been served;

2. Three copies of the foregoing Brief in Opposition have been served on counsel of record for each of the other parties separately represented in this proceeding at their post office addresses as follows:

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3. Service on each of such parties were made on the 30th day of September, 1982, by depositing said copies of this Brief in Opposition in a United States post office, first class postage prepaid, and addressed to the above-named counsel.

Frank Caton

FRANK CATON